(3)

No. 89-163

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURRILLO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANUM FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-163

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

---

1. The government seeks review of the court of appeals' ruling that a magistrate's failure to observe the "first appearance" requirement of the Bail Reform Act of 1984, 18 U.S.C. 3142(f) (Supp. V 1987), requires the pretrial release of a person who would otherwise be subject to pretrial detention. Respondent contends (Br. in Opp. 4-5) that this dispute is now moot because–contrary to his representations at the detention hearing–he did exactly what the government warned that he would do: once released, he immediately fled the jurisdiction to avoid prosecution. Far from establishing mootness, respondent's flight underscores the need for this Court to review the court of appeals' error.

Respondent argues (Br. in Opp. 4) that the government cannot seek review of the court of appeals' decision, but it

does "ha[ve] the option" of revoking his release. See 18 U.S.C. 3148 (Supp. V 1987). However, he offers no explanation why, if the government can pursue that remedy, it cannot seek review of the erroneous release order. If respondent were correct in asserting that the matter is moot, then *no* remedy would be available. In any event, the release order in this case cannot be revoked until respondent is rearrested. The Bail Reform Act's release revocation provisions specify that the government immediately may obtain a warrant for the fugitive's arrest, but they indicate that the revocation proceedings do not begin until the fugitive has been "brought before a judicial officer * * * for a proceeding in accordance with this section." 18 U.S.C. 3148 (Supp. V 1987). Thus, the Bail Reform Act's release revocation provisions, like the Act's provision of penalties for failure to appear (18 U.S.C. 3146 (Supp. V 1987)), do not provide a means of correcting the court of appeals' ruling.

Respondent also contends (Br. in Opp. 5) that the government's reliance on this Court's decision in *United States* v. *Sharpe*, 470 U.S. 675 (1985), is misplaced because "[m]ootness was not truly an issue in *Sharpe*." This Court's opinion in *Sharpe* indicates that respondent is incorrect. It unequivocally states that "respondents' fugitive status does not render this case moot" because "our reversal of the Court of Appeals' judgment may lead to reinstatement of respondents' convictions" (*id.* at 681 n.2). Similarly, this case is not moot because the Court's reversal of the court of appeals' decision would lead to imposition of a detention order.

2. Respondent additionally contends (Br. in Opp. 5-6) that this case does not warrant the Court's review because "[t]he Courts of Appeals do not clearly disagree on the issue." The court of appeals did not concur in that

assessment. See Pet. App. 13a ("circuit courts are divided in their conclusion as to what the remedy should be"). As we explained in our petition (at 11 & n.7), the First, Fourth, and Eleventh Circuits have all declined to follow the rule that the court applied in this case. See *United States* v. *Clark*, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc); *United States* v. *Vargas*, 804 F.2d 157, 162 (1st Cir. 1986); *United States* v. *Hurtado*, 779 F.2d 1467, 1481-1482 (11th Cir. 1985). Moreover, the issue has continuing and far-reaching importance. See Pet. 11-13.

3. Finally, respondent argues (Br. in Opp. 8-10) that the court of appeals' decision is correct. He acknowledges that the Bail Reform Act does not set forth the remedy for a violation of the "first appearance" requirement, but he contends that "[l]ogic" compels the court of appeals' result in this case. The consequence of respondents' "logic" is that a person who was arrested and charged with smuggling 72 pounds of cocaine across an international border was released from custody under conditions that the district court concluded would not "reasonably assure the appearance of the person as required and the safety of any other person and the community" (18 U.S.C. 3142(e) (Supp. V 1987)). See Pet. App. 16a. To no one's surprise, the person fled. We do not believe that the Bail Reform Act or any principle of "logic" requires that result.

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari, it is therefore respectfully submitted that the petition should be granted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00520